SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-534

JAMES HERBERT PARRISH - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY AND APPENDIX

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October __, 1979

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JAMES HERBERT PARRISH - - - *Petitioner*

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COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, JAMES HERBERT PARRISH, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the Supreme Court of Kentucky entered in this proceeding on April 10, 1979.

OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky is reported at Ky., 581 S. W. 2d 560 (1979). A Petition for Rehearing was filed and the Supreme Court of Kentucky was ordered to respond. The Order of the Supreme Court of Kentucky overruling Petitioner's Petition for Rehearing was entered on July 3, 1979 (Appendix B).

JURISDICTION

The Order of the Supreme Court of Kentucky was entered on April 10, 1979, and a timely Petition for Rehearing was denied by Order of the Supreme Court of Kentucky on July 3, 1979. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Kentucky's Mandatory Non-Probation Sentencing Statute, K.R.S. 533.060, is Impermissibly Over-Inclusive and Violative of the Eighth Amendment of the United States Constitution?

2. Whether Petitioner was Denied Due Process of Law When the Trial Court Permitted Testimony Relating to Petitioner's Silence While *Within* Police Custody?

3. Whether Petitioner was Denied Due Process of Law When the Prosecuting Attorney Presented the Jury With Facts Not Contained in the Record and Denounced, Within the Hearing of the Jury, Defense Counsel's Proper Objections?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides in pertinent part as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

K.R.S. 533.060 provides in pertinent part as follows:

> (1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge.

STATEMENT OF THE CASE

This is a prosecution under K.R.S. 507.020 (Murder). The case was tried before a jury in the Butler Circuit Court on January 2, 3, 4, and 5, 1978.

The Indictment charged that the Petitioner committed the crime of murder by shooting Billy Johnson with a pistol on or about the 31st day of August, 1976.

After all the evidence had been heard, the case went to the jury. The jury deliberated for a period of over four hours before returning its verdict of guilty as

charged and fixing his sentence at twenty years imprisonment.[1]

On the 16th day of March, 1978, the defense filed a Motion for Probation. By Order of the Court probation was denied.

Petitioner appealed the conviction to the Supreme Court of Kentucky. The conviction was affirmed by the Supreme Court (Appendix A). A timely Petition for Rehearing was filed on April 27, 1979. The Petition was denied on July 3, 1979 (Appendix B). Petitioner filed a Motion to Recall the Mandatè pending consideration by this Court of the within Petition. Said motion was sustained July 20, 1979.

REASONS FOR GRANTING THE WRIT

1. This Court Can Put an End to Mandatory Non-Probation Sentencing Statutes Which Are Impermissibly Over-Inclusive and Deny Probation to Ideal Candidates By Determining if K.R.S.[2] 533.060 Is Cruel and Unusual Punishment, Violative of the Eighth Amendment of the United States Constitution.

On the 14th day of April, 1978, a formal hearing was held before the Butler Circuit Court on the Petitioner's motion for probation which had theretofore been filed. [T.E., Vol. III, pp. 44-57; T.R., p. 137; Motion for Probation.] At said hearing, the Commonwealth objected to any consideration of probation and cited as its authority therefor, the express verbiage of

[1]By statute, K.R.S. 532.060, The Jury Fixes the Punishment in Kentucky.

[2]Kentucky Revised Statutes

K.R.S. 533.060. K.R.S. 533.060 provides, in pertinent part:

> (1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge.

Defense counsel objected to any summary denial of probation and argued that the aforementioned statute was violative of the Eighth Amendment of the United States Constitution.

> Mr. Rueff: Therefore, I am making a motion at this time and asking the Court to continue this hearing so that I can make a motion in writing, with argument, that K.R.S. 533.060(1) is unconstitutional, that it violates Section 17 of the Kentucky Constitution, the Eighth Amendment of the United States Constitution. . . . [T.E., Vol. III, p. 46.]

Both the prosecutor and the Court expressed doubts as to the constitutionality of K.R.S. 533.060, but nevertheless the Court opted to observe the statute's clear import. Therefore, probation was summarily denied the Petitioner. The prosecutor commented:

> Mr. Cook: I think that the defendant may have a good point there on the constitutionality of it,

> because frankly until fairly recently I was really thinking that it provided that no probation or shock probation or conditional discharge could be considered any time a person committed an offense with a deadly weapon, but closer look at the statute does reveal that it refers to a gun, and frankly I would see no difference in committing murder with a knife and a gun and I would really have no objection to seeing the constitutionality of the statute tested out before this Motion is ruled on.
>
> The Court: I have some doubt as to the constitutionality of this statute, but I am not going to hold this motion up until the defendant can test the constitutionality of it. It is my holding that as it now stands, K.R.S. 533.060 prevents me from probating this man, and makes him ineligible for probation. So the Motion for Probation is overruled—denied. [T.E., Vol. III, pp. 50-51.]

Petitioner submits that K.R.S. 533.060 is impermissibly over-inclusive and violative of the Eighth Amendment of the United States Constitution. The Eighth Amendment provides, in relevant part, that cruel and unusual punishment shall not be inflicted.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Petitioner submits that K.R.S. 533.060 is unusual punishment in that it summarily denies probation to all candidates without regard to his or her qualifications. The statute of which this Petitioner complains is completely devoid of any "humanizing" characteristics. It places within the same category the hardened

criminal, the first-time offender, and the repetitive offender. Hence, the statute is over-inclusive and sweeps too broadly to pass constitutional muster.

Herbert Parrish is neither a hardened criminal nor a repeat offender. On the contrary, Petitioner is an excellent candidate for probation for the following reasons: (1) Petitioner has no prior criminal record and has been a resident of Butler County all of his life. (2) This man, a veteran of the Korean War, was a public official in his community, serving as a local magistrate. (3) He has been married to the same woman for over twenty-nine (29) years and has raised six children during that time. These facts portray a stable, law-abiding citizen, yet K.R.S. 533.060, because of its over-inclusive quality, has summarily denied the Petitioner probation.

The aforementioned statute was mandatorily imposed in the present case without consideration of the particular circumstances so surrounding the particular offense or the offender. This Court has long recognized that punishment should not only fit the offense, but also, the offender.

> We have long recognized that for the determination of sentences, justice generally requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender. [Numerous citations omitted.] *Gregg* v. *Georgia,* 428 U. S. 153, 189 (1976).
>
> * * *
>
> [T]he punishment should fit the offender and not merely the crime. [Citation omitted.] The belief

> no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Williams* v. *New York,* 337 U. S. 241, 247 (1949).

K.R.S. 533.060 ignores *Gregg* and *Williams* since it imposes the penalty of NO PROBATION without regard to this offender's previous case history. Such a blind and mindless mandatory law is contrary to the ends of the criminal justice system.

> [I]ndividual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted by the Court as a humanizing development. [Citations omitted.] [I]t has been widely accepted that *mandatory sentences for crimes do not best serve the ends of the criminal justice system.* [Emphasis added.] *Furman* v. *Georgia,* 408 U. S. 238, 402-403 (1972), Mr. Chief Justice Burger, dissenting.

In its Opinion, the Supreme Court of Kentucky stated that it is the province of the General Assembly to fix punishment for a violation of a criminal statute. (Appendix A, p. 28.) Petitioner agrees, but suggests that the Supreme Court of the United States should strike down such a statute when, as in this case, it is in violation of the Eighth Amendment.

The Kentucky Supreme Court further reasoned that if life imprisonment without benefit of parole is constitutional as was decided in *Green* v. *Commonwealth,* Ky., 556 S. W. 2d 684 (1977), then by analogy, so is K.R.S. 533.060. The Petitioner suggests that such

reasoning is unfounded and illogical since other Kentucky sentencing statutes have been declared unconstitutional.

> We have determined the 1974 *mandatory death statute* to be unconstitutional in *Boyd* by virtue of the decisions of the Supreme Court of the United States cited therein. [Emphasis added.] *Self* v. *Commonwealth,* Ky., 550 S. W. 2d 509 (1977).

Although one sentencing statute may be constitutional, it does not necessarily follow that all statutes are constitutional.

In its Opinion, the Supreme Court of Kentucky attempted to justify the statute on the basis that firearms are inherently more dangerous to human lives than other weapons.

> Firearms are inherently more dangerous to human life than other weapons . . . [Appendix A, p. 29.]

Petitioner submits that firearms are no more dangerous to human life than axes, butcher knives, bows and arrows, or ice picks. It seems inherently illogical and fundamentally unfair for an individual convicted of murdering by ax or butcher knife to have an opportunity at probation, when that same opportunity is summarily denied another because of the type of weapon employed in the commission of the crime. Some of history's most heinous crimes have been committed with knives and axes. Under Kentucky law, Jack the Ripper would have been eligible for probation whereas Petitioner, a law-abiding and upstanding member of

the community for his entire life, is automatically and summarily denied probation. This statute is overbroad in that it places Petitioner and others similarly situated in the same position as that of a hardened criminal. The punishment defined by K.R.S. 533.060 is highly unusual and violative of the Eighth Amendment.

This Court has held that the focus of probation is on how the sentencing judge views the offender and *not* on how society views the offense. Furthermore, that a sentencing judge needs an *exceptional* degree of flexibility to *individualize* each case in order to give a *humane* and *comprehensive* consideration to the particular situation of each offender.

> The focus on probation is *not* on how society views the offense, but on how the sentencing judge views the offender. . . . [T]he necessity to *individualize* each case, to give that *careful, humane,* and *comprehensive* consideration to the particular situation of each offender, we have held requires the exercise of a broad discretion and an exceptional degree of flexibility. [Emphasis added.] *Frank* v. *United States,* 395 U. S. 147, 23 L. Ed. 2d 162, 171, 172, 89 S. Ct. 1503 (1969).

However, K.R.S. 533.060 removes *all* discretion from the sentencing judge and unjustly precludes from consideration the Petitioner's impeccable history of service to his community and his family. In essence, the statute does away with the necessity to individualize each case and, therefore, imposes upon a first-time offender an additional penalty.

Denying the instant Petitioner probation amounts to no more than the purposeless and needless imposition of pain and suffering; hence, it is cruel and unusual.

> [A] punishment is "excessive" and unconstitutional if it 1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or 2) is grossly out of proportion to the severity of the crime. *Coker* v. *Georgia,* 433 U. S. 584 (1977).

The Supreme Court of Kentucky ignored the Eighth Amendment by not declaring K.R.S. 533.060 unconstitutional and reversing the decision of the Circuit Court.

2. This Court Can Determine Under What Circumstances Will Testimony Relating to a Defendant's Silence While *Within* Police Custody Deny Such a Defendant Due Process of Law.

On the day of trial, immediately preceding the Commonwealth's opening statement, defense counsel moved the Court, *in limine,* to prohibit the prosecution from referring to, at any stage of the trial, the fact that the Petitioner had exercised his Fifth Amendment right and remained silent immediately following the shooting.

> Mr. Haddad: The objection I have is to the question that Jim Phelps testified to at the Examining Hearing. He said that he has asked the accused why he had shot him and the accused re-

fused to tell him. The accused did say, prior to being taken into custody that he had shot the decedent and that after that Jim Phelps asked him another question as to what for, or for what reason, and the defendant refused to tell him anything further. I am objecting to his commenting upon the defendant's refusing to tell him why he shot him, because he had a right to refuse.

The Court: I think he can introduce that into the evidence, but he can't comment on it. He can show that happened. [T.E., Vol. I, pp. 6-7.]

* * *

The Court: I think they can show it happened, but the Commonwealth's Attorney can't comment on it.

Mr. Haddad: So the record will be clear, we are objecting both to the Commonwealth commenting on it and to the introduction of any such evidence through the witness, Phelps.

The Court: Well, I will sustain your objection insofar as the Commonwealth's commenting on it, but I am over-ruling it, so far as introducing it into evidence.

Mr. Cook: As I understand, I can state in my opening statement as to the fact of what took place there, but I can't make any comment as to why he didn't make any further statement.

The Court: You can state that it happened, and that is all. [T.E., Vol I, p. 7.]

At trial, during the Commonwealth's direct examination of James Phelps, the arresting officer at the scene, the prosecution as expected, attempted to introduce evidence of Petitioner's silence while within police custody. Again, the defense immediately objected. [T.E., Vol. I, pp. 50-51.] The prosecutor proceeded to elicit from witness Phelps the highly prejudicial information of which Petitioner complains.

Mr. Cook: Did you learn anything more about what had happened up there, at that time?

Mr. Phelps: No sir, because like I say, I didn't talk to Mr. Parrish any more about it because the Detective came, I think Wallace came and Joe Webb was there, and he made the statement that he did it and his reasons, *that he would rather not tell.* [Emphasis added.] [T.E., Vol. I, p. 56.]

The testimony of Phelps allowed the jury to speculate as to the reason for the Plaintiff's silence. The jury was allowed the opportunity to associate silence with guilt. In essence, the Petitioner was penalized for having exercised his Fifth Amendment right to remain silent. Such a penalty cannot be tolerated.

This Court in the celebrated case of *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), elaborated at length on the incriminating significance of a suspect's refusal to talk. In *Miranda,* the Court forbade the penalization of a defendant for exercising his Fifth Amendment right to remain silent.

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is *under police custodial interrogation.* The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Miranda* v. *Arizona, supra.,* n. 37, at p. 720. [Emphasis added.]

The Supreme Court of Kentucky, in *Campbell* v. *Commonwealth,* Ky., 564 S. W. 2d 528 (1978), cited with approval the aforementioned portion of *Miranda* v. *Arizona, supra,* Thus, Kentucky law is in accord that it is impermissible to introduce any evidence which demonstrates that a criminal defendant stood mute or opted to remain silent while within policy custody. A criminal defendant may not be so penalized for remaining silent. Yet, penalization was the exact consequence of Officer Phelps' testimony. By eliciting testimony regarding the Petitioner's silence while within police custody, the prosecuting attorney implanted within the minds of the jurors the belief that Petitioner had something to hide.

The logical nexus between a defendant's silence and his guilt is at best tenuous. In fact, this Court has determined such silence to be "insoluably ambiguous." *Doyle* v. *Ohio,* 426 U. S. 610, 49 L. Ed. 2d 91, 97, 96 S. Ct. 2240 (1976). There exists a variety of factors which might influence a suspect's decision to remain silent. Despite the myriad of nonprejudicial reasons for which a suspect may choose to remain silent, this Court has recognized that it is the prejudicial reason to which the jury will assign more weight. As mentioned above, the prejudicial reason is that such a person has something to hide.

> . . . evidence of silence . . . has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. *Doyle, supra,* at 107.

In its Opinion, the Supreme Court of Kentucky held that the Petitioner was not within police custody when he opted to remain silent. ". . . [H]e was not in police custody. . . . " (Appendix A, p. 27.) Petitioner strongly disagrees and submits that he was unquestionably within police custody when the prejudicial statement was made.

In a most recent and important case, this Court has held that a person is siezed in the Fourth Amendment sense, when he is not free to go.

> There can be little doubt that petitioner was seized in the Fourth Amendment sense when he was taken involuntarily to the police station . . . . He was *never informed* that he was *"free to go"*; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. [Emphasis added.] *Dunaway* v. *N. Y.*, —— U. S. ——, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979).

In the case at bar, as in *Dunaway,* Petitioner was never informed by any of the officers that he was free to go. Undoubtedly, Petitioner would have been physically restrained if he had tried to vacate the scene.

Pursuant to the reasoning in Dunaway, Petitioner was within police custody even though he wasn't formally booked or told he was under arrest.

> The mere fact that petitioner was *not "booked,"* and would not have had an arrest record if the interrogation had proven fruitless, while not insignificant for all purposes, obviously do not make

> petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. [Emphasis added.] *Id.* at 836.

In the case at bar, the police *never* told petitioner that he was not under arrest. Under *Dunaway,* in light of all the surroundings, Petitioner must be considered to have been within police custody at the point in time he opted to remain silent. That is to say, the shooting had transpired; the deputy sheriff was at the scene; the Petitioner admitted that he had shot the deceased; the deputy sheriff was directing questions to the Petitioner as to his reasons for shooting the deceased; and most importantly, the Petitioner was not free to go.

Since the Petitioner was unquestionably within police custody, testimony relating to the Petitioner's silence was serious error in that it denied Petitioner due process of law.

3. A Decision By this Court Would Decide Under What Circumstances a Defendant Is Denied a Fair and Impartial Trial, Where a Prosecuting Attorney, In His Closing Argument Presents the Jury with Facts Not Contained in the Record and Denounces Defense Counsel's Proper Objections.

During his closing argument, co-counsel for the Commonwealth, Mr. Chyle, made several remarks which effectively denied JAMES HERBERT PARRISH a fair trial. Prior to closing argument, the defense had proven that a knife was found on the dashboard of Petitioner's truck, which the deceased had in his possession at the time of the shooting. Hence, a case of self-

defense was established. Apparently, in an attempt to refute this defense, Mr. Chyle told the jury that Petitioner's brother could have been responsible for placing the knife on the dashboard.

> Now, let me tell you, Herbert has got a brother, Walter, and he has got a boy who works right up there and who has got such a knife. *He has got a brother who has got such a knife.* You know what, after the shooting that nephew—they *could have* got this thing up and that nephew *could have* put that same type knife right on that dash. [Emphasis added.] [T.E., Vol. III, p. 36.]

Not a scintilla of evidence was proffered to substantiate such a statement. Counsel for Petitioner, Mr. Haddad, immediately objected to the statement since no evidence was admitted at trial to even remotely suggest such an event.

> Haddad: I object, your Honor, there is no proof of that.
>
> Chyle: I said he could have done it.
>
> Haddad: Oh well, there is no evidence here, your Honor. [T.E., Vol. III, p. 36.]

In its affirming Opinion, the Supreme Court held that the evidence proffered at trial established that "... the nephew and the deceased worked at the same meat packing company, and the same type knife (boning knife) found in the pickup truck was issued to the employees." (Appendix A, p. 26.) Accordingly, the Court reasoned that the remark of which Petitioner complains was a "reasonable inference from the evi-

dence which the jury might consider if it so wished." (Appendix A, p. 26.) A closer review of the evidence establishes that no connection or nexus between the meat company and the knife in question was ever established. In fact, any such theory was completely "ruled out" during the direct examination of the owner of the meat packing plant.

> Mr. Haddad: You can't tell whether that particular knife was one that was used at your place of business or not, can you?
> Mr. Klineline: No sir, I can't.
> [T.E., Vol. II, p. 71.]

In essence, the prosecution was permitted to create damaging evidence to negate the Petitioner's proper defense.

It is rather apparent that the complained of remark was not a reasonable inference from the evidence because the prosecution made no attempt to substantiate its ill-founded claim with evidence. The Commonwealth, in their brief before the Supreme Court of Kentucky, conceded that there was no direct testimony that Petitioner's nephew in fact had a knife, but still argued that such an inference was proper:

> This inference from the evidence was proper even though there was *no* direct testimony that the appellant's nephew did *in fact* have such a knife. [Appellee's Brief, p. 6.]

Petitioner respectfully submits that in the absence of *any* evidence or testimony that the nephew had such

a knife, it was manifestly improper for the prosecutor to argue *that the facts were* that the nephew did have such a knife. The prosecutor is not at liberty to argue something is a *fact* that is not contained in the record.

> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal. . . . A.B.A. Standards for Criminal Justice, *The Prosecution Function,* § 5.9.

Petitioner submits that the Petitioner went beyond the bounds of justice by striking foul blows and making deductions from matter not contained in the record. In essence, he abused his role as defined in *Berger* v. *United States,* 295 U. S. 78 (1935).

> As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at p. 88.

These foul blows struck by the prosecutor denied the Petitioner due process of law and his fundamental entitlement to a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments.

The prosecution struck another foul blow when the defense attempted to properly object to the patent

impropriety of the complained of remark. Defense counsel's proper objection was denounced as an effort to conceal the truth, a slap at the jury. That is to say, the prosecutor informed the jury that the sole reason that the defense was objecting was because his remark was "hurting" the defense.

> (Chyle continuing) It is hurting, why they are objecting. It is hurting, what I am telling you—
>
> Haddad: I object, if your Honor please, to his commenting upon the objections by counsel. We have a right to do so.
>
> Chyle: I didn't object to you at any time while you were arguing, Mr. Haddad.
>
> Haddad: I object again, your Honor.
>
> Chyle: And I have a right to draw conclusions.
>
> Haddad: I object again, your Honor, to the comments of Mr. Chyle.
>
> Court: Yes, let's get on with the case.
>
> [T.E., Vol. III, p. 37.]

In its Opinion, the Supreme Court of Kentucky reasoned that said statement was " . . . an impropriety" although not sufficiently prejudicial so as to deny Petitioner a fair trial. (Appendix A, pp. 26-27.) Petitioner respectfully disagrees. Petitioner had no other weapon with which to protect himself. Once Petitioner had been stripped of his entitlement to object, he stood helpless against the prosecution's prejudicial barrage of innuendo and suspicion. As a result, all defense testimony became equated with an effort to conceal the truth, a slap at the jury.

> With this blow struck at a point when the defense could no longer respond to prosecutorial argument except by objection, Mr. Casey had prejudiced the right of the defendant to object to impermissible argument. *Every defense objection, every motion for mistrial, was now an effort to conceal the truth, a slap at the jury.* [Emphasis supplied.] *Houston* v. *Estelle,* 569 F. 2d 372 (5th Cir. 1978).

In essence, defense counsel could no longer properly object to anything.

At the close of the Prosecutor's argument, counsel for the Petitioner moved the court to discharge the jury based on four distinct grounds which included the prosecutor's injecting into the record matters which were not supported by the evidence and his improper comment on defense counsel's proper objection. Said motion was erroneously overruled. [T.E., Vol. III, pp. 39-41.] As the record clearly reflects, the trial court was cognizant of the improper and inflammatory comments of the prosecutor and hence bound, in the interests of justice, to discharge the jury. By the Court's failing to so act, Petitioner was denied a fair and impartial trial in violation of the sixth and fourteenth amendments.

CONCLUSION

The Supreme Court of Kentucky failed to uphold the Eighth Amendment in not declaring K.R.S. 533.060 unconstitutional. The Petitioner was denied due process of law when testimony relating to his silence while within police custody was admitted into evidence. The

Petitioner's fundamental right to a fair and impartial trial was again violated when the prosecutor presented facts to the jury that were not contained in the record. For the reasons hereinabove stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

JAMES HERBERT PARRISH - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

April 10, 1979.
Rehearing Denied July 3, 1979

Defendant was convicted before the Butler Circuit Court, Earl F. Martin, J., No. 12,277, of wilful murder, and he appealed. The Supreme Court, Stephenson J., held that: (1) prosecutor's remark during closing argument that defense was objecting for reason that remarks were "hurting" was an impropriety, but it did not unfairly prejudice defendant; (2) testimony of deputy sheriff as to conversation with defendant at scene of alleged murder and concerning defendant's culpability did not violate rule proscribing comment on a defendant's Fifth Amendment right to remain silent; (3) record failed to establish that trial court had abused its discretion in denying change of venue on asserted ground of pretrial publicity, and (4) statute whereby General Assembly imposed restriction of no probation for an offense involving a firearm is not invalid as inflicting cruel and unusual punishment or as a denial of equal protection of law.

JUDGMENT AFFIRMED.

1. Criminal Law 720(9)

In view of circumstances of finding of knife in defendant's pickup truck day following incident resulting in alleged wilful murder of victim, prosecutor's closing remarks

that a nephew of defendant could have placed knife in pickup truck were reasonable inferences from evidence which jury might consider if it so wished on defendant's claim of self-defense in that victim had approached him with knife in hand.

2. Criminal Law 713, 730(1)

Prosecutor's remark during closing argument that defense was objecting for reason that remarks were "hurting" was an impropriety, but it did not unfairly prejudice defendant, where court had directed counsel to get on with the case.

3. Criminal Law 407(1)

Testimony of deputy sheriff as to conversation with defendant at scene of alleged murder and concerning defendant's culpability did not violate rule proscribing comment on a defendant's Fifth Amendment right to remain silent, inasmuch as defendant did not remain silent, he was not in police custody and made various statements to bystanders and to deputy sheriff when he responded to a natural question of deputy sheriff "What happened?" U.S.C.A. Const. Amend. 5; KRS 507.020, 532.060.

4. Homicide 188(5)

After defendant had adduced some evidence that he had acted in self-defense, any proof of claimed violent and dangerous character of victim could only be made by evidence of his general reputation in community for such character, and not by evidence of specific acts of general bad conduct or for isolated facts not connected with homicide in question.

5. Criminal Law 121

Record failed to establish that trial court had abused its discretion in denying change of venue on asserted ground of pre-trial publicity.

6. Constitutional Law 250.3(2)
Criminal Law 982.2, 1213

Statute whereby General Assembly imposed restriction of no probation for an offense involving a firearm is not invalid as inflicting cruel and unusual punishment or as a denial of equal protection of law. KRS 533.060, 533.060(1); U.S.C.A. Const. Amends. 8, 14.

Frank E. Haddad, Jr., Louisville, William E. Rueff, Jr., Morgantown, for appellant.

Robert F. Stephens, Atty. Gen., Patrick B. Kimberlin, III, Asst. Atty. Gen., Frankfort, for appellee.

STEPHENSON, Justice.

James Herbert Parrish was convicted of wilful murder, KRS 507.020, and sentenced to a term of imprisonment of twenty years in accordance with KRS 532.060. Parrish appeals; we affirm.

On the day of the incident, Parrish observed Billy Johnson, the victim, leaving a filling station near Parrish's home. Parrish followed Johnson down the road. After Parrish blinked his lights at Johnson both men stopped their vehicles, Johnson's car several feet in front of Parrish's pickup truck. A passerby saw Johnson standing near the cab of the pickup truck. The passerby stopped at a place of business a few hundred feet down the road and was informed by the proprietor that he had heard gunfire. Both men then proceeded back down the road where they found Johnson's body lying near the front of the pickup truck. Parrish was standing nearby. When a deputy sheriff arrived on the scene, Parrish told him "I just shot him." Another passerby stopped shortly after the shooting, and was told by Parrish when asked why he had shot Johnson, that Johnson was going to pull him out of his pickup truck and beat hell out of him. This witness saw no weapon on or near Johnson's body. Another witness who stopped at the scene

was told by Parrish that he had stopped Johnson to talk about "family affairs" and that Johnson threatened to pull him out of his pickup truck and give him a "whipping."

Parrish testified that a man named Willis had stated to him that Johnson had told Willis he had been going with Parrish's sister-in-law and wife. Parrish testified that several days later, on the day of the incident, he followed Johnson from the filling station and after stopping Johnson to talk with him, Johnson alighted from his car and came over to his pickup truck. Parrish testified that he repeated to Johnson what Willis had told him and that Johnson threatened to drag him out of the truck and "whip the hell" out of him. He testified that Johnson started coming at him through the door of the pickup truck with a knife in his hand. Parrish testified that he then shot and killed Johnson in self-defense. The knife, according to Parrish, was found in his pickup truck the following day.

[1] First Parrish complains of inflammatory and prejudicial remarks during closing argument. The Commonwealth's attorney told the jury that a nephew of Parrish could have placed the knife in the pickup truck. From the evidence it appears that the nephew and the deceased worked at the same meat packing company, and the same type knife (boning knife) found in the pickup truck was issued to the employees. In view of the circumstances of the finding of the knife the day following the incident, we are of the opinion that the remarks of the Commonwealth's attorney were reasonable inferences from the evidence which the jury might consider if it so wished. *Hunt* v. *Commonwealth,* Ky. 466 S. W. 2d 957 (1971).

[2] The remark to the jury that the defense was objecting for the reason that the remarks were "hurting" is an impropriety; however, the trial court directed counsel to get on with the case. In our view the impropriety did not unfairly prejudice Parrish, nor do we consider that any of

these remarks so inflamed the jury as to deny Parrish a fair trial.

[3] The next assignment of error is that the trial court permitted the deputy sheriff, who first arrived on the scene, to relate his conversation with Parrish that "he made the statement that he did it and his reasons, *that he would rather not tell.*" The trial court had previously ruled that this testimony was admissible with a caution to the Commonwealth not to make any comments.

Parrish argues that permitting this testimony into evidence is a breach of the rule laid down by the U. S. Supreme Court against commenting on a defendant's Fifth Amendment right to remain silent. *Doyle* v. *Ohio,* 426 U. S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The simple answer to Parrish's argument is that he did not remain silent. He was not in police custody and made various statements to bystanders and to the deputy sheriff. In view of the entire testimony of the deputy sheriff, we are of the opinion there was not a violation of the *Doyle* rule. Parrish did not stand mute; nor did he claim his Fifth Amendment privilege; neither was there an accusation at the time. In short, he responded to a natural question of "What happened?" posed by a deputy sheriff who arrived on the scene. His reasons for his act were given to other bystanders, and these reasons were consistent with his defense at trial.

[4] Parrish testified that he was aware of the deceased's reputation for being a person of violent character. He then attempted to testify as to specific incidents of violence. The trial court declined to admit this testimony and Parrish argues error.

The rule in this jurisdiction is that once the defendant has adduced some evidence that he acted in self-defense, "Proof of the violent and dangerous character of deceased can only be made by evidence of his general reputation in the community for such character, and not by evidence of

specific acts or general bad conduct, or of isolated facts, which are not connected with the homicide." *Roberson's New Criminal Law and Procedure,* Second Edition, § 489, p. 657. See also *Amos* v. *Commonwealth,* Ky., 516 S. W. 2d 836 (1974), and *McGill* v. *Commonwealth,* Ky., 365 S. W. 2d 470 (1963).

[5] Parrish argues that he was entitled to a change of venue for the reason of pre-trial publicity. However, our review of the record shows that, at the hearing on the motion, conflicting testimony was introduced, and there is no suggestion that the trial court abused its discretion in denying the change of venue.

[6] Last Parrish argues that KRS 533.060 is unconstitutional. The trial cour refused to consider probation for Parrish in accordance with KRS 533.060(1), which provides:

> "When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge."

We are of the opinion that the mandatory provisions of KRS 533.060 do not inflict cruel and unusual punishment, nor do these provisions deny Parrish equal protection of the law.

It is the province of the General Assembly to fix punishment for a violation of the criminal statutes. By analogy, if a sentence of life imprisonment without benefit of parole is constitutional, as was decided in *Green* v. *Commonwealth,* Ky., 556 S. W. 2d 684 (1977), then we fail to see the cruel and inhuman argument of Parrish on the lesser penalty

here. We are of the further opinion that the General Assembly by imposing the restriction of no probation for an offense involving a firearm, as here, makes a reasonable classification of weapons used in the commission of crimes. Firearms are inherently more dangerous to human life than other weapons, and the General Assembly has expressed a public policy in the terms of KRS 533.060 which does not violate either the Constitution of the United States or the Constitution of Kentucky.

The judgment is affirmed.

ALL CONCUR.

APPENDIX B

SUPREME COURT OF KENTUCKY

File No. 78-SC-486-MR

JAMES HERBERT PARRISH

v.

COMMONWEALTH OF KENTUCKY

Appeal From Butler Circuit Court Action No. 12,277

Opinion Rendered—April 10, 1979

MANDATE

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

July 3, 1979 Appellant's Petition for Rehearing Denied.

A Copy—Attest

Issued July 3, 1979

(s) Martha Layne Collins, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-534

JAMES HERBERT PARRISH - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT F. STEPHENS
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CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-534

JAMES HERBERT PARRISH - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the Supreme Court of Kentucky is reported at *Parrish* v. *Commonwealth,* Ky., 581 S. W. 2d 560 (1979).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because said application fails to meet the jurisdictional requirements of 28 U.S.C. § 1257(3).

The Petition for Writ of Certiorari is predicated upon the following contentions: I. Whether KRS 533.060 is unconstitutional as violative of the Eighth Amendment to the United States Constitution? II. Whether the trial court violated petitioner's rights under the Fifth Amendment to the United States Constitution pertaining to his silence at the scene of the crime? III. Whether petitioner's rights to due process of law were violated by comments made by the prosecutor in his summation to the jury? The respondent submits that none of the foregoing issues rise to constitutional proportions or are of such magnitude as to present to this Court sufficient grounds to exercise its discretionary jurisdiction pursuant to Supreme Court Rule 19.

I.

KRS 533.060(1) prohibits the grant of probation, shock probation or conditional discharge to any person convicted of a Class A, B or C felony where such offense involved the use of a weapon from which a shot or projectile may be discharged. Such is the case here where the petitioner used a firearm to shoot to death the decedent. The trial judge applied the foregoing statute to the facts of the instant case and denied probation consideration to the petitioner. Petitioner now maintains that KRS 533.060 is unconstitutional because it constitutes cruel and unusual punishment under the Eighth Amendment to be denied the right to probation summarily. The respondent disagrees.

The respondent submits that the Commonwealth's prohibition against probation in certain circumstances as set out in KRS 533.060 does not violate the Eighth Amendment. This Court has previously held than an actual criminal penalty of imprisonment *without benefit of parole* is constitutional. *Schick* v. *Reed,* 419 U. S. 256 (1974). Such a penalty is far more severe than the prohibition against probation. Accordingly, it would be nonsensical to find KRS 533.060 unconstitutional upon the grounds of cruel and unusual punishment. Therefore, the respondent submits that this contention does not present a sufficient ground as would authorize the discretionary jurisdiction to be exercised. *Department of Mental Hygiene* v. *Kirchner,* 380 U. S. 194 (1965); *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969).

II.

As will be set out later in this Response, there was no violation of *Doyle* v. *Ohio,* 426 U. S. 610 (1976). The testimony adduced at trial established that the petitioner did not remain silent after the shooting but made several comments to civilians and officers of the law. These individuals came forward and testified at trial *as to what the petitioner did say.* It is clear beyond question from the record that the prosecutor was not attempting to elicit any adverse comment from any of the witnesses about the petitioner's silence. The focus of attention at trial was *what the petitioner had said.* Given these factual circumstances there has been no violation of the petitioner's right to remain

silent as guaranteed by the Fifth Amendment to the United States Constitution. Therefore, this contention does not reflect a substantial federal question and thus does not afford any basis for review by Writ of Certiorari. *Maryland and Virginia Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U. S. 367 (1970).

III.

Finally, the petitioner contends that the prosecution made such flagrant and prejudicial comments during his summation to the jury as to deny the petitioner due process of law. The respondent would direct the Court's attention to Argument III in this Response with respect to the facts pertaining to this issue. Perusal of those facts quickly reduces this contention to the specious. In fact, the respondent would respectfully submit that this contention is so lacking in merit that it should be dismissed by the Court as frivolous. *Swafford* v. *Templeton,* 185 U. S. 487 (1902); *Palmer Oil Co.* v. *Amerada Corp.,* 343 U. S. 390 (1952).

SUMMARY

In summary, the respondent submits that the petitioner's application for Petition for Writ of Certiorari should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3). The purpose of review by way of certiorari is not to give the defeated party another hearing. Certiorari jurisdiction is a creature of discretion and in the instant case the petitioner has clearly failed to establish that

this Court should exercise its discretion to grant review by certiorari. Supreme Court Rule 19.

The respondent will now endeavor to respond to the contentions raised by the petitioner as thougth those contentions were properly before the Court, even though respondent maintains that they are not.

COUNTERSTATEMENT OF THE CASE

During the late afternoon hours of August 31, 1976 Billy Johnson drove into Coburn's Service Station which is located on Highway 70 near the intersection with Highway 185 in Butler County, Kentucky. (Transcript of Evidence, hereinafter TE, Vol. I, 12). After purchasing a few dollars of gasoline, Johnson left the service station and drove west on Highway 70 toward Morgantown, Kentucky. (TE, Vol. I, 15). At about the same time, the petitioner, James Herbert Parrish, who lives directly across from Coburn's Service Station, had just driven his pick-up truck into his driveway when he observed Johnson leaving the service station. (TE, Vol. II, 31-32; Vol. I, 15, 24). Petitioner followed after Johnson and caught up with him a mile or so down the road. After petitioner blinked his lights at Johnson both men stopped their vehicles, Johnson's car stopping several feet in front of the petitioner's pick-up truck in the west bound lane. (TE, Vol. II, 33; Vol. I, 30).

Moments later David Whittinghill was driving east on Highway 70 and saw Johnson standing near the cab of the pick-up truck in which the petitioner was

sitting. (TE, Vol. I, 30). However, as Whittinghill reached his destination, Teddy Roman's Body Shop, a few hundred feet down the road, Teddy told him that he had just heard gunfire. (TE, Vol. I, 32). Teddy got into Whittinghill's car and they proceeded back down Highway 70 where they found Johnson lying in the road in the west bound highway with part of his body across the line in the east bound lane near the front of petitioner's pick-up truck. (TE, Vol. I, 33-34, 40). Petitioner was standing nearby. (Id., 35).

Petitioner had flagged down a passing motorist and told him to call the law, that he had just shot someone. (Id., 45-46). When Deputy Sheriff Phelps arrived petitioner told him that "I just shot him." (Id., 53). There was a bullet hole approximately one inch above Johnson's right eye and the little finger of his left hand was nearly shot off. (Id., 53). A .38 caliber pistol belonging to the petitioner was found in the cab of the pick-up truck. (Id., 54-55). None of the witnesses at the scene observed any marks or bruises on the petitioner nor any weapon near Johnson's body. Id., 54, 58, 63).

Vesper Coy, another passerby, pulled off the road, and talked with petitioner apparently shortly after the shooting. (Id., 102). When he asked petitioner why he shot Johnson, petitioner told him that Johnson was going to pull him out of his pick-up truck and beat the hell out of him. (Id., 103). Coy saw no weapon on or near Johnson and no bruises or marks on the petitioner. (Id., 103). Petitioner also told Dewey Shepherd at the scene that he had stopped Johnson

to talk about "family affairs" whereupon Johnson threatened to pull petitioner out of his pick-up truck and give him a "whipping." (Id., 115).

At trial, petitioner was to testify that a man named Willis had told him that Johnson had told him that he (Johnson) had been going with the petitioner's sister-in-law and the petitioner's wife. (TE, Vol. II, 50-52, 57-58). Willis took the stand and confirmed this conversation. (Id., 76-77). Petitioner further testified that three or four days after this conversation with Willis he was pulling into his driveway when he saw Johnson driving down Highway 70. (Id., 32). As previously noted, petitioner followed and then stopped Johnson in order to talk to him. Petitioner testified that Johnson got out of his car very quickly and came over to the cab of appellant's pick-up truck. (Id., 34). Petitioner allegedly repeated to Johnson what Willis had told him, whereupon Johnson allegedly threatened to drag him out of the truck and "whip the hell" out of him. (Id., 34). Petitioner then said he placed his hand on a .38 caliber pistol he had in the cab of the truck. He testified that Johnson started coming at him through the door of the vehicle *with a knife in his hand.* Petitioner admitted shooting Johnson but maintained that it was in self-defense. (Id., 34-35).

The Commonwealth established that although petitioner made numerous statements to passersby and the authorities when they arrived at the scene of the shooting, he made no mention to any of them of having been threatened by Johnson with a knife. In fact, the knife

allegedly used by Johnson did not turn up until the following day when the petitioner "found" the knife in the cab of his pick-up truck.

The October, 1976 term of the Butler County Grand Jury returned an indictment against the petitioner charging him with the offense of willful murder, as proscribed by KRS 507.020. (Transcript of Record, hereinafter TR, 4-5). At a jury trial held in the Butler Circiut Court on June 3-5, 1978, petitioner took the stand and testified in his own behalf. Petitioner admitted killing the deceased but testified that he did so in self-defense. (TE, Vol. II, 11-72). However, the jury returned a verdict finding petitioner guilty as charged and fixed his punishment at 20 years imprisonment. (TR, 95). Judgment was entered accordingly, and petitioner appealed his conviction to the Kentucky Supreme Court which affirmed his conviction in *Parrish* v. *Commonwealth,* Ky., 581 S. W. 2d 560 (rendered April 10, 1979). This Petition for Writ of Certiorari now results.

ARGUMENT

I.

KRS 533.060 Is Not Unconstitutional Under the Eighth Amendment to the United States Constitution.

Petitioner vigorously maintains that KRS 533.060(1), insofar as it prohibts the grant of probation by the trial court to a person convicted of an offense involving the use of certain kinds of weapons (i.e. pistol), is unconstitutional upon the grounds that

it violates the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution.[1] The respondent disagrees.

It would seem somewhat nonsensical to hold a prohibition against probation upon conviction for a particular offense to be unconstitutional under the Eighth Amendment where this Court as well as Kentucky courts have previously held an actual penalty[2] of *imprisonment without benefit of parole* to be constitutional: *Schick* v. *Reed,* 419 U. S. 256 (1974); *Green* v. *Commonwealth,* Ky., 556 S. W. 2d 684 (1977); *Edwards* v. *Commonwealth,* Ky., 500 S. W. 2d 396 (1973); *Martin* v. *Commonwealth,* Ky., 493 S. W. 2d 714 (1973). The position of the Commonwealth as to the penalty of life without benefit of parole upon conviction of the offense of rape has recently been upheld in the federal courts in *Moore* v. *Cowan,* 560 F. 2d 1298 (6th Cir., 1977), cert. denied 98 S. Ct. 1500. The abovementioned penalties are much more severe than the one complained of in this case, yet, as noted above, they have been found to be constitutional under the Eighth Amendment.

For example, pursuant to 26 U.S.C. § 7237(d) an individual convicted of certain federal narcotic offenses

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[1]KRS 533.060(1) reads as follows:

"When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge."

[2]Respondent, for purposes of argument only, is assuming that the prohibition against probation as applied in this case constitutes a *penalty.*

is denied probation and parole under federal law. This statutory prohibition has been upheld as constitutional in a number of instances. For example, see *United States* v. *Del Toro,* 426 F. 2d 181 (5th Cir. 1970). cert. denied 400 U. S. 829; *United States* v. *Williams,* 442 F. 2d 738 (D.C. Cir. 1970); *Sperling* v. *Willingham,* 353 F. 2d 6 (7th Cir., 1965), cert. denied 384 U. S. 962; *Halprin* v. *United States,* 295 F. 2d 458 (9th Cir., 1961). By analogizing the particular statutory provision in question in the instant case to the cases dealing with the aforementioned federal statute, this Court can safety arrive at the conclusion that KRS 533.060(1) does not constitute cruel and unusual punishment.

Although the constitutionality of this statutory provision was not specifically under attack upon Eighth Amendment grounds, recent Kentucky cases clearly uphold, albeit implicitly, the constitutionality of KRS 533.060. *Blondell* v. *Commonwealth,* Ky., 556 S. W. 2d 682 (1977); *Wethington* v. *Commonwealth,* Ky. App., 549 S. W. 2d 530 (1977). Furthermore, it is the legislature that makes the laws that declare what are criminal offenses and defines the processes by which these laws are enforced including the power to modify and provide for abatement or suspension of parole, probation, etc. See generally *Lovelace* v. *Commonwealth,* 285 Ky. 326, 147 S. W. 2d 1029 (1941).

It would also seem to follow that the legislature has the power to withhold an opportunity for a convicted felon to have the advantage of probation or parole for having committed a particular offense. Compare *Bel* v. *Chernoff,* 390 F. Supp. 1256 (D.Mass. 1975).

In summary, it is the position of the respondent that KRS 533.060(1) is not repugnant to the Eighth Amendment of the United States Constitution upon the ground that it allegedly constitutes cruel and unusual punishment. Moreover, respondent asserts that the singling out by the legislature of those persons who commit felony offenses involving the use of a weapon from which a shot or projectile may be discharged, capable of producing death or other serious physical injury, is a sufficient basis to deny probation as well as shock probation and conditional discharge. Accordignly, the trial court did not err by refusing to grant probation to the appellant. The petition should be denied.

II.

The Trial Court Did Not Commit Constitutional Error by Allowing Into Evidence Testimony Pertaining to Comments Made by the Petitioner at the Scene of the Crime.

Petitioner urges that the trial court denied him due process of law and thus committed reversible error when it admitted into evidence, over his objection, testimony which he maintains relates to his silence while he was allegedly in police custody. *Doyle* v. *Ohio,* 426 U. S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The respondent submits that there was no *Doyle* violation of constitutional rights.

It is the position of the respondent that the Commonwealth did not introduce any evidence with respect to the fact that petitioner had exercised his Fifth

Amendment right to remain silent immediately following the shooting. In fact, the testimony in issue here, that of Deputy Sheriff Phelps, had nothing at all to do with what the petitioner *did not say,* but rather, focused upon what the petitioner *did say.*

The evidence adduced at trial, from both civilian witnesses and officers of the law, established that the petitioner did not remain silent after the shooting, or for some time thereafter. (TE, Vol. I, 35, 45-46, 53-56, 61, 112, 114-115). Petitioner, on the other hand, testified that he did not remember what he might have said afterwards. (TE Vol. II, 65).

Phelps, who was apparently the first officer to arrive at the scene of the shooting and *did not know what had happened or who was involved* asked the petitioner, who was standing nearby, "What happened?" and petitioner hold him, "I just shot him." (TE, Vol. I, 53). A few minutes later Phelps looked in the cab of petitioner's pick-up truck and asked him if the gun lying there in the seat of the cab was the one with which he had shot Johnson. Petitioner responded in the affirmative. (TE, Vol. I, 55). This line of questioning by the prosecutor of Phelps finally culminated some pages later when Phelps was asked

> "Q. Did you learn anything more about what had happened up there at that time?
>
> A. No sir, because, like I say, I didn't talk to Mr. Parrish any more about it because the Detective came, I think Wallace and Joe Webb was there, and he made the statement that he did it and his reasons, that he would rather not tell." (TE, Vol. I, 56).

From reading the above quoted testimony within context of the record, and more particularly the entire testimony of Deputy Sheriff Phelps, it is clear that the prosecutor was not attempting to elicit any adverse comment from Phelps about the petitioner's silence. Again, the focus of attention was what the petitioner *had said and the statements he had made, not his silence.* Compare *United States* v. *Ivey,* 546 F. 2d 139 (5th Cir., 1977), cert. denied, sub nom. *Taglione* v. *United States,* 431 U. S. 943 (1976).

Interestingly enough, the first reference as to the petitioner's constitutional right to remain silent was brought up not by the prosecutor, but by counsel for the petitioner upon cross-examination of Phelps. (TE, Vol. I, 61). The jury's attention was again focused upon the petitioner's right to remain silent later in the trial during the redirect examination of the petitioner *by his counsel.* (TE, Vol. II, 67). Thus, the only testimony in this record which could conceivably be construed as a *Doyle* violation was elicited not by the prosecution but by the petitioner.

To reiterate, no action was taken on the part of the prosecution or the trial court which resulted in testimony being introduced by the Commonwealth that would require reversal of this conviction under *Doyle* v. *Ohio, supra.* Parrish had not remained silent after the shooting. Therefore, the testimony presented by the prosecution with reference to the statements he made at the scene of the crime were perfectly admissible. Compare *Mishler* v. *Commonwealth,* Ky., 556 S. W. 2d 676, 681 (1977). After all, if the accused

makes, as here, an admissible statement, the recounting witness may testify to what the accused said up until the accused refused to make any more statements. The witness, as here, may conclude his account in a natural fashion by indicating there is nothing more to say because the accused chose to stop. *United States* v. *Williams,* 556 F. 2d 65, 67 (D.C. 1977), cert. denied 97 S. Ct. 2936. Otherwise, the jury may erroneously infer that it was the police who cut the interview (or conversation) short before the accused had a full opportunity to give his account. No constitutional error occurred under the facts of this case.

III.

The Petitioner's Rights to Due Process of Law Were Not Violated by the Comments Made by the Prosecutor in His Summation to the Jury.

During the course of a ten page summation to the jury by the prosecutor the petitioner made two objections, which closely followed one another, to certain allegedly objectionable comments. (TE, Vol. III, 36-37). His objections were overruled and petitioner now urges reversible error in this regard. The respondent disagrees.

Petitioner's first objection was to the prosecutor's comments pertaining to the petitioner's nephew who also worked at the same meat packing company as did the deceased. The prosecutor commented that *this nephew also had a boning knife* such as that which the petitioner presented in evidence as the one allegedly

used by the deceased during an attack upon the petitioner. The petitioner objected to this comment upon the ground that there was no evidence to support it. (TE, Vol. III, 36). The trial court ruled that, although there was no direct evidence as to that specific point, the prosecutor had a right to draw his own conclusions from the record and overruled the objection. The respondent respectfully submits that under the facts of this case no due process violations occurred.

The owner of the meat packing plant, Marshall Klineline, testified that the petitioner's nephew also worked there as had the deceased. (TE, Vol. II, 72-73). Klineline also testified that the boning knife introduced into evidence was of the same type as the boning knives used at his plant by his employees and that those knives, in effect, become the property of his employees. (TE, Vol. II, 70, 72).

Here, it is obvious that the Commonwealth was merely drawing a reasonable inference from Klineline's testimony that the petitioner's nephew would also have such a boning knife as that introduced into evidence. This inference from the evidence was proper even though there was no direct testimony that the petitioner's nephew did *in fact* have such a knife. Under these circumstances, no error occurred since the prosecutor may make legitimate deductions and reasonable inferences from the evidence deduced at trial. *Hunt* v. *Commonwealth,* Ky., 466 S. W. 2d 957 (1971).

Secondly, petitioner complains of the comments made by the prosecutor which immediately followed

appellant's initial objection. When the trial court overruled the first objection, the prosecutor commented,

> "It is hurting, why they are objecting. It is hurting, what I am talling (sic) you." (TE, Vol. II, 37).

When the petitioner in turn objected to the above comment, the prosecutor pointed out that he had not objected while defense counsel was summing up. This comment by the prosecutor was, in turn, followed by yet another objection of defense counsel. The respondent takes the position that these latter comments made by the prosecutor do not constitute reversible error.

The respondent would admit that the latter two comments made by the prosecutor *could have best been left unsaid.* However, the question to be resolved here is whether those comments so inflamed the jury as to render them unable, as a matter of due process, to impartially consider the issue of petitioner's innocence or guilt. The respondent urges that those comments taken within the context of the entire trial did not take undue advantage of the petitioner. Cf. *Webb* v. *Commonwealth,* Ky., 451 S. W. 2d 397 (1970).

Secondly, those comments certainly did not add any "fuel to the fire" as the case here was already before the jury on the evidence and the allegedly objectionable comments may at best be considered as frivolous remarks. Compare *Timmons* v. *Commonwealth,* Ky., 555 S. W. 2d 234 (1977). Nor did the petitioner request the trial court to admonish the jury with respect to those comments. Under these circumstances, no denial of due process occurred.

CONCLUSION

For the foregoing reasons the respondent respectfully submits that the petitioner has failed to present a substantial federal question which would authorize much less warrant the exercise of this Court's discretion under Rule 19. Therefore, respondent urges that the petition be dismissed.

Respectfully submitted,

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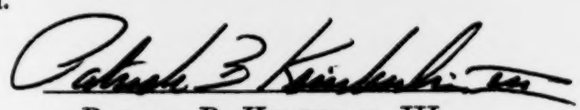
Counsel for Respondent

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of October, 1979, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing three copies in the United States Mail, first class postage prepaid, and addressed to Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Ky. 40202, Counsel for Petitioner, and Hon. William E. Rueff, Warren and Ohio Streets, Morgantown, Ky. 42261, Of Counsel.



PATRICK B. KIMBERLIN, III
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SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-534

JAMES HERBERT PARRISH - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-534

JAMES HERBERT PARRISH - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In its Brief in Opposition, the respondent has *first* raised an argument which merits response. Respondent suggests that the singling out of persons who use firearms in the commission of a felony is a sufficient basis to deny probation, shock probation, or conditional discharge. Respondent is, in essence, suggesting that K.R.S. 533.060 is not in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

> Moreover, respondent asserts that the singling out by the legislature of those persons who commit felony offenses involving the use of a weapon from which a shot or projectile may be discharged, capable of producing death or other serious physi-

cal injury, is a sufficient basis to deny probation as well as shock probation and conditional discharge. [Respondent's Brief, p. 11.]

Petitioner submits that there is *no* rational basis for *summarily* denying probation to an individual convicted of a Class A, B or C felony on the basis that a firearm was employed in the commission of the crime. Petitioner submits that K.R.S. 533.060 is, in fact, totally *irrational* and, therefore, violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

This Court has held that under a traditional equal protection analysis, a statute enacted by the legislature cannot be sustained unless it is rationally related to and in furtherance of a legitimate governmental interest.

> Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.
> * * *
> Thus, if it is to be sustained, the challenged classification must rationally further some legitimate governmental interest other than those specifically stated in the congressional "declaration of policy." [Citation omitted.] *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 37 L. Ed. 2d 782, 787, 788, 93 S. Ct. 2821 (1973).

Petitioner submits that K.R.S. 533.060 is in violation of the Equal Protection Clause for two reasons. First, the statute is not rationally related to the furtherance

of any governmental interest. On the contrary, this statute is totally *irrational,* since it makes no measurable contribution to the acceptable goals of punishment and veritably frustrates the cornerstone of our system of criminal justice, rehabilitation of the convicted.

Unquestionably, probation is a most desirable disposition to be used in most cases, since, among other things, it promotes the rehabilitation of the offender by continuing normal community contacts and avoids the negative effects of confinement which complicate the reintegration of the offender into the community.

> 1.2 Desirability of probation.
> Probation is a desirable disposition in appropriate cases because:
> * * *
> (ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;
> (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community.
> *A.B.A. Standards for Criminal Justice,* Probation, §1.2, p. 27.

Probation often will offer far more meaningful possibilities for rehabilitation than will other sentencing alternatives, *particularly* in the *case of first offenders. A.B.A. Standards, supra, Commentary,* p. 28.

Petitioner submits that K.R.S. 533.060 is *irrational* since it ignores this premier and fundamental concept

of rehabilitation through probation by summarily denying probation to this Petitioner, a first-time offender, and others similarly situated. Petitioner suggests that a more rational legislative approach, to deter the use of firearms in Class A, B, or C felonies would be to increase the length of punishment for those offenses. This approach would, in effect, increase the penalty, thereby deterring the crime, but yet would *not* obstruct the government's interest in rehabilitating the convicted through probation. This approach would not frustrate the immeasurable contribution that probation makes to our system of criminal justice.

Secondly, K.R.S. 533.060 is in violation of the Equal Protection Clause since it *irrationally* denies probation only to those persons who have employed the use of a firearm in the commission of a Class A, B, or C felony. In its Opinion, the Supreme Court of Kentucky attempted to justify the statute on the basis that firearms are inherently more dangerous to human lives than other weapons.

> Firearms are inherently more dangerous to human life than other weapons . . . .
> [Appendix A, p. 29.]

Petitioner submits that such a justification is *irrational* since firearms are no more dangerous to human life than axes, butcher knives, bow and arrows, or ice picks. It seems inherently illogical and fundamentally unfair for an individual convicted of murdering by ax or butcher knife to have an opportunity at probation, when that same opportunity is summarily denied another because of the type of weapon employed in the

commission of the crime. Some of history's most heinous crimes have been committed with knives and axes. Under Kentucky law, Jack the Ripper would have been eligible for probation whereas Petitioner, a law-abiding and upstanding member of the community for over twenty-nine (29) years, is automatically and summarily denied probation.

In conclusion, Petitioner submits that K.R.S. 533.060 is irrational, and, therefore, violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for two reasons. First, the statute makes no measurable contribution to acceptable goals of punishment. On the contrary, the statute frustrates the goal or cornerstone of our system of criminal justice, rehabilitation of the convicted through probation. Secondly, it is irrational to grant probation to an individual who commits a Class A, B, or C felony, by the use of a butcher knife, ax. bow and arrow, poison or other weapon, and summarily deny probation to one who employs a firearm in the commission of the crime. For the reasons enumerated in our Petition and for those reasons hereinabove stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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